MICHIGAN APPELLATE ASSIGNED COUNSEL SYSTEM

TERENCE R. FLANAGAN
ADMINISTRATOR

August 28, 2003

Hon. Maura D. Corrigan
Chief Justice
Michigan Supreme Court
Hall of Justice
P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2002-34

Dear Chief Justice Corrigan:

I am writing on behalf of all MAACS attorneys to strongly oppose the proposed amendments to MCR 7.212. While the goal of reducing the time a case languishes in the Court of Appeals is definitely a desirable one, this proposal will not effectuate that result. In fact, in many of the appointed criminal appeals, which comprise approximately half of the Court's docket, implementation of the proposed new time limits will actually increase the time between the filing of the claim and the appellant's brief, a consequence that surely cannot be intended (details to follow).

The proposal has unified all the diverse groups comprising the appellate bar -- criminal and civil, plaintiff and defense. The Appellate Practice Section of the State Bar, the Bar's Board of Commissioners, the Attorney General, and a special task force commissioned by the Bar's past president have concluded that the proposal is ill-advised. All 21 practitioners who have filed formal responses to date (as recorded on the Court's website) have urged the Court to reject the plan -- prosecutors, SADO attorneys, MAACS attorneys, solo practitioners, and large and small firm appellate specialists. There are many reasons why these diverse groups have joined hands.

The proposal is:

- Unfair,

  because it squeezes the attorneys to comply with even tighter timing deadlines when the current deadlines are already stringent, and strictly enforced;

- Unwise,

  because inevitably the quality of the briefing will suffer when insufficient time is available to prepare this key pleading which frames the appeal and shapes the Court's ultimate decision;

- Unreasonable,

  because it fails to consider the inability of counsel to control the date on which the time for filing the brief commences -- which in appointed criminal appeals is invariably the date the court reporter files the last transcript. Counsel does not have the luxury of controlling the briefing schedule; the due date is set by the reporter. MAACS cases can come due at approximately the same time even when the appointments were made months apart. If counsel only had one case at a time this lack of control would make little difference but, of course, counsel usually has many cases in the appellate pipeline, other aspects of a practice beyond appeals and, lest it be forgotten, a life to lead; and

- Unwarranted,

  because there will be no net gain to the Court. As long as the Court lacks the research staff to more expeditiously process the cases, counsel's refrain will only switch from "hurry up and wait" to "hurry up more and wait longer." Or, as one commentator has aptly noted, should counsel continue to file the brief in the same amount of time as now, counsel will just forfeit oral argument and be "late faster."

The court rules and longstanding Court of Appeals policy currently provide the appellant with 112 days in which to file a timely brief and preserve oral argument: the initial 56 days provided in MCR 7.212(A)(1)(a)(iii), plus 56 more via stipulation and/or motion. By reducing the allotted time to 42 days, eliminating 28-day stipulations and limiting extensions to 14 days only when exceptional circumstances exist, the time will be reduced, at best, by 50% (to 56 days) and in most cases by 63% (to 42 days). Due to the obligations on appointed counsel, 42 days is simply an unreachable deadline and virtually guarantees a high rate of "failure." Remember that counsel is new to the case, must often squeeze uncooperative court reporters to prepare the required transcripts and is required to consult with clients scattered at any of 54 correctional facilities all around the state. I submit that any appellate counsel with even a light caseload will be unable to fulfill those duties and still properly research and write a quality brief within that narrow window.

In the first paragraph I mentioned the result in many cases will be additional delay. Reason? If counsel cannot meet these tighter deadlines, more cases will wind up being placed on the Court's involuntary dismissal docket.[1] Since those cases cannot be dismissed, but rather are remanded to the trial court for the appointment of substitute

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[1]While once a significant problem, the number of cases placed on the docket has decreased significantly over the years, beginning with your tenure as the Chief Judge in 1997-1998.

counsel who will have to start the process anew, and which resets the clock, the time "saved" in most cases will be offset by the further delays in these involuntary dismissal docket cases.

Last, but certainly not least, I would ask that the Court recognize the paltry fees paid to MAACS attorneys by most circuit courts. For the most extreme example, Macomb Circuit pays appellate counsel $25 per hour, a fee set nearly 30 years ago. It is already a difficult task for MAACS to recruit, and keep, qualified attorneys to handle these cases for the pittance they receive. If these proposed time limits are adopted and the Court of Appeals turns the screws even tighter, then my recruiting task will switch over from difficult to impossible.

Time savings can be realized at other stages of the process. Why should court reporters get 91 days to prepare a trial transcript (whether a half-day bench trial or a lengthy jury trial) while the attorneys who actually litigate the case would, as proposed, get only 42 or 56 days? I urge this Court to reject the proposal and maintain the status quo.

Very truly yours,

Terence R. Flanagan

cc: Hon. Michael F. Cavanagh
Hon. Elizabeth A. Weaver
Hon. Marilyn J. Kelly
Hon. Clifford W. Taylor
Hon. Robert P. Young, Jr.
Hon. Stephen J. Markman
Hon. William C. Whitbeck

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